Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1806

ROY RATLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. _____

ROY RATLEY,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 1, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto. On May 27, 1976, the Court of Appeals entered an order staying mandate until final disposition in this Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 1, 1976. A timely Petition for Rehearing was filed and was de-

nied on May 13, 1976. A copy of that Order appears in the Appendix hereto. This Petition for Writ of Certiorari is filed within thirty (30) days of that Order. This Court's jurisdiction is invoked under *28 U.S.C. Section 1254(1)*.

QUESTIONS PRESENTED

1. What effect does an expungement of the record of a state felony conviction have on federal prosecutions for receiving a firearm in or affecting interstate commerce?

2. Is it required that in order to sustain a conviction for receiving a firearm in or affecting interstate commerce that there be proof that the "revolver" is an operable firearm?

3. Does a conviction for receiving a firearm in or affecting interstate commerce require a finding of specific intent?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

Amendment II:

"A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

STATUTORY PROVISIONS INVOLVED

KANSAS STATUTES ANNOTATED:

Section 21-4201:

"(1) Unlawful use of weapons is knowingly:

. . .

(d) Carrying any pistol, revolver or other firearm concealed on the person except when on his land or in his abode or fixed place of business.

. . .

(3) It shall be a defense that the defendant is within an exemption."

Section 21-4204:

"(1) Unlawful possession of a firearm is:

. . .

(b) Possession of a firearm with a barrel less than twelve (12) inches long by a person who, within five (5) years preceeding such violation has been convicted of a felony under the laws of Kansas or any other jurisdiction or has been released from imprisonment for a felony. . ."

Section 21-4617:

"(a) Every offender who was twenty-one (21) years of age or older at the time of the commission of the crime for which he was committed and who has served the sentence imposed or who has fulfilled the conditions of his probation, suspension of sentence, conditional release or parole for the entire period thereof, or who shall have been discharged from probation, conditional release or parole prior to the

termination of the period thereof, may petition the court five (5) years after the end of such sentence, the fulfilling of such conditions of probation, suspension of sentence, conditional release or parole or such discharge from probation, conditional release or parole and may request that his record be expunged of such conviction if during such five (5) year period such person has exhibited good moral character and has not been convicted of a felony. In considering any such request for expungement, the court shall have access to any records or reports relating to such offender, including records or reports of a confidential nature, on file with the secretary of corrections or the Kansas adult authority.

(b) Any person having his record so expunged shall thereafter be released from all penalties and disabilities resulting from the crime of which he has been convicted, and he shall in all respects be treated as not having been convicted, except that upon conviction of any subsequent crime such conviction may be considered as a prior conviction in determining the sentence to be imposed. The offender shall be informed of this privilege when he is placed on probation, suspended sentence, conditional release or parole.

(c) In any application for employment, license or other civil right or privilege, or any appearance as a witness, a person whose conviction of crime has been expunged under this statute may state that he has never been convicted of such crime."

UNITED STATES CODE:

Title 18 Appendix:

Section 1202:

"(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony

. . .

and who receives, possesses, or transports in commerce or affecting commerce, . . ., any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

. . .

(c) As used in this title—

. . .

(3) 'firearm' means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; . . .; or any destructive device. Such term shall include any handgun, rifle or shotgun;

. . .

(5) 'handgun' means any pistol or revolver originally designed to be fired by the use of a single hand and which is designed to fire or capable of firing fixed cartridge ammunition, or any other firearm originally designed to be fired by the use of a single hand."

Section 1203:

"This title shall not apply to—

. . .

(2) Any person who has been pardoned by the President of the United States or the chief executive of a state and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm."

Title 28:

Section 1738:

". . .

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions, by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court, within the United States and Territories, and Possessions as they have by law or usage in the courts of such State . . . from which they are taken."

STATEMENT OF THE CASE

Petitioner, the defendant below, was charged in the United States District Court for the District of Kansas, by an Indictment returned January 10, 1975, alleging that Petitioner between January 9, 1974 and August 19, 1974, knowingly received in interstate commerce and affecting commerce a firearm, he having been convicted on August 29, 1963, of a felony, in violation of *Section 1202(a)(1), Title 18,* United States Code Appendix.

The evidence before the Grand Jury and the trial of this case was presented by a "special attorney" assigned to a "Strike Force" of the United States Department of Justice.

Prior to trial the Petitioner filed several pretrial motions including motions for a bill of particulars, a motion to suppress statement of Defendant, a motion to suppress evidence because of illegal search and seizure of the gun in question, motion for discovery and inspection, motion to dismiss. These motions were all denied by the Trial Court.

The evidence tended to establish that Petitioner was an employee of Sam's Loan Company in Kansas City, Kansas. Sam's Loan Company was a pawn shop and as such pawned and sold guns. The gun in question belonged to the Estate of Sam Gorelick which owned Sam's Loan. The gun was made in Massachusetts and in December, 1970 had been shipped to Sam's Loan Office in Kansas City, Kansas. There was no evidence that the Petitioner was then an employee of Sam's, or that he possessed the gun other than while he was at the store.

On August 19, 1974, two agents of the Alcohol, Tobacco and Firearms Agency entered Sam's Loan in an effort to locate a suspect named Bobby Jones. The agents advised Petitioner of this and, according to their testimony, he became nervous, his stomach muscles under his shirt twitched. One of the agents observed

a "bulge" in Petitioner's front pocket. This bulge was not a gun. The agents ordered Petitioner to submit to a search. Petitioner refused, and removed a gun from under his shirt and gave it to his wife. The agents forcibly took it from Mrs. Ratley.

Prior to this the agents had secured a copy of Petitioner's 1963 Kansas state conviction. The Stevens County, Kansas, District Court, had on September 30, 1974, entered an Order expunging the record of Petitioner's conviction. Petitioner objected to the introduction of the record of conviction so obtained because it was inadmissible in evidence under Kansas law and therefore under *28 U.S.C. 1738.* These objections were denied.

Petitioner attempted to establish in evidence that Sam's Loan had been robbed on numerous occasions, some involving shootings including one homicide. One of the shootings involved the wounding of the Petitioner shortly before trial while he was unarmed. An offer of proof was almost made to the effect that employees were required to carry weapons for the safety of the store and for their own protection while in the store. The trial court refused to allow such evidence and ruled as a matter of law that possessing a weapon for self-protection or protection of property was not a legal defense (Tr. 44-45).

The Petitioner also offered to introduce that under Kansas State law, Petitioner could lawfully possess a firearm. The trial court refused to allow such evidence, and ruled that the expungement of the record was not retroactive.

There was no evidence that the revolver in question was an operable firearm. The evidence was that the re-

volver was loaded only with wad cutter ammunition. The trial court refused a request by the Petitioner that the jury be instructed that the offense charged required a finding of specific intent.

The jury returned a verdict of guilty and Petitioner was sentenced to one year and one day in the custody of the Attorney General. Upon appeal the Court of Appeals affirmed, also holding that the expungement occurred after the receipt of the firearm and that the expungement under Kansas law did not make the record a "nullity". The Court of Appeals also held that the evidence need not establish that a gun is an operable firearm, and that specific intent and knowledge are not elements of the offense charged.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Important and Significant and Recurring Problems Concerning Receipt or Possession of Guns by Persons Previously Convicted of Felonies Which Have Not Heretofore, but Should Be, Settled by This Court.

Expungement of Felony Conviction

There appears to be two conflicting trends in criminal law. First, the trend to restrict the receipt or possession of firearms, and, secondly, the widespread adoption of expungement statutes.

This Court in *United States* v. *Bass* (1971), 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488, distinguished between charges under *18 U.S.C. App. 1202(a)* of "possession" and "receiving" a firearm because of an ambiguity. There the Court said, loc. cit. 92 S.Ct. 518:

> "Because its sanctions are criminal and because, under the Government's broader reading, the stat-

ute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress;"

and at 92 S.Ct. 523,

"As this Court emphasized . . . we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."

As a result of *Bass* the Indictment in this case alleged "receipt" rather than possession. Clearly, the Petitioner's receipt or possession of the revolver in question was lawful under Kansas state law. His conviction in 1963 was over five years old and he had the weapon at his fixed place of business. See *Kansas Statutes Annotated, Sections 21-4201(1)(d)* and *21-4204 (1)(b)*. *18 U.S.C. App. 1202(a)(1)*, however, appears to make Petitioner's possession (i.e.: receipt) of the revolver a federal offense.

It is, however, a present trend in criminal jurisprudence, to authorize the expungement of prior felony conviction records. Obviously, this trend is in harmony with the desire to rehabilitate persons once convicted of crime. The new *Federal Rules of Evidence, Rule 609*, is an example of this trend. In subparagraph (b) a ten (10) year time limit is in general placed upon the use of prior convictions for impeachment. In subparagraph (c) it is provided:

"Evidence of a conviction is not admissible under this rule if (a) the conviction has been subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted. . ."

Kansas has adopted a statute by which Petitioner, prior to trial, secured an expungement of his felon record. *Sec. 21-4617 KSA*. That statute does require a finding of the equivalent of rehabilitation. *18 U.S.C. App. 1203(2)* exempts from the operation of *Sec. 1202* persons who have been pardoned. It should be pointed out that the Kansas Governor's power to pardon is statutory, and further, that he signed *Sec. 21-4617* into law.

It is obvious that the effect of an expungement under state law will be a recurring question in Indictments under *18 U.S.C. App. 1202(a)(1)*. If such expungements mean nothing under such federal prosecutions then the States, and those holding such expungement orders, should be told now.

Three basic questions are here presented. (1) Does an expungement order exempt a previously convicted person from this firearm prohibition? (2) Is an expungement order retroactive where it is obtained after the alleged receipt of the firearm but before the federal charge is lodged?, and (3) Does an expungement order from a state court make a record of conviction in that court inadmissible in federal court to establish such prior conviction?

Under the new Rules of Evidence the answer to (3) would be yes, at least for impeachment purposes, but how about its admissibility to establish an essential element of a federal offense?

The Government below contended and the Court of Appeals agreed, that the Kansas statute presented here did not make the Petitioner's conviction inadmissible, because it provides in part:

"(b) . . . except that upon conviction of any subsequent crime such conviction may be considered as a prior conviction in determining the sentence to be imposed."

Clearly, this provides only for the enhancement of punishment and not as a basis of a criminal charge. Kansas, like other states, provides as a voting qualification that the voter not be a convicted felon and it is a crime for a felon to illegally vote. Certainly, if a prior felon, who has had his record expunged under *Section 21-4617*, votes, that provision would not make him subject to prosecution. If it did, then *21-4617* would be of no value or purpose.

The trial court, and the Court of Appeals below, did not reach question (1) above. Both courts in regard to question (2) ruled that such orders are not retroactive. Both of these issues were presented by pre-trial motion to dismiss, which was overruled, and during trial by an offer of proof, which was refused.

The record of conviction in the Stevens County, Kansas, District Court, which was offered in the trial below was obtained in April, 1974, four months before the alleged offense. Obviously, the agents had "plans" before they entered Sam's Loan Company on August 19, 1974, and ordered Petitioner to submit to a search. The expungement order of the 1963 conviction was entered shortly after the seizure of the revolver, and several months before the return of the Indictment herein. During the trial the Petitioner objected to the introduction of the court record, because under Kansas law the record had been expunged and under *28 U.S.C. 1738*, which governs the admissibility of such records, it must be given only such effect and credit as it

would have in the Kansas court, i.e.: none, except for enhancement of punishment. If a judgment in one state is a nullity then that judgment is a nullity in other states. See *People of New York ex rel. Halvey* v. *Halvey* (1947), 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 609; *Smith* v. *Smith* (D.C.Cir. 1961), 288 F.2d 151; and *Holm* v. *Shilensky* (2nd Cir. 1968), 388 F.2d 54.

Operable Firearm Issue

18 U.S.C. App. 1202 prohibits a convicted felon from receiving a firearm that is in or affects commerce. A "firearm" is defined as a *weapon* which will or is designed to or may readily be converted to *expel a projectile* by the action of an explosive. Exhibit 5 was stipulated to be a "Smith and Wesson .38 caliber Model 36, five shot revolver, bearing Serial No. 7J8620". There was no other evidence regarding the exhibit's capabilities, design or operability. It was loaded with "wadcutter ammunition" and not with fixed cartridge ammunition. There was no evidence it was ever test fired or examined.

Few of us are not familiar with cap guns, toy revolvers and replica guns, none of which would be classified as "weapons" or as "firearms". Petitioner was charged with a criminal violation and it was essential that the prosecution introduce evidence to establish his guilt beyond a reasonable doubt. Convictions which are devoid of evidentiary support violate due process. See *Thompson* v. *City of Louisville* (1960), 362 U.S. 199, 4 L.Ed.2d 654.

In *United States* v. *Thompson* (N.D.Cal. 1962), 202 F.Supp. 503, the District Court found that a weapon without a firing pin was not a "firearm" since it

was inoperable. The usual, customary and easy way to prove operability is to test fire the alleged firearm. That was not done here. See for example, *United States* v. *Decker* (6th Cir. 1961), 282 F.2d 89.

Petitioner respectfully suggests that this Court should settle what is required to prove a revolver is a "firearm".

Specific Intent Issue

Petitioner requested the trial court instruct the jury that under the facts of this case a violation of *18 U.S.C. App. 1202* required a finding of specific intent. This requested instruction was in the form set forth in *Federal Jury Practice and Instructions,* Devitt and Blackmar, Section 13.03. The trial court ruled as a matter of law that no specific intent was required and all that was needed was "to show that the Defendant knew that he received or had a gun" (Tr. 116). Indeed, the court instructed the jury that it need not find a specific intent (Tr. 154-155).

It is true that a majority of the decisions of the circuits do not require specific intent. However, in *United States* v. *DeBartolo* (1st Cir. 1973), 482 F.2d 312, the First Circuit pointed out that the requirement of more than a general intent created difficulties that must be governed on a case by case basis.

Certainly, a defendant could not be convicted under *18 U.S.C. App. 1202* if he did not know that the item was a firearm. Should a felon be prohibited by this statute from disarming an assailant? Is a felon confronted with the choice of either being killed or punished under federal law if he protects himself or his place of business?

The trial court ruled that "self-defense" was not a defense to the charge (Tr. 44, 112, 116-117). Duress and coercion may be a defense to criminal prosecutions. In *Tomoya Kawakita* v. *United States* (1952), 343 U.S. 717, 72 S.Ct. 950, this Court even noted that employment may, under certain circumstances, produce sufficient coercion or duress to justify an acquittal.

In our present case the evidence established that the revolver was acquired by Sam's Loan Company in 1970. There was no evidence Petitioner was even employed there when it was received, or that he knew it had ever been in interstate commerce. Petitioner offered to prove that there had been numerous robberies and attempted robberies at Sam's Loan, one of which resulted in a homicide of an employee; that shortly before trial, and while unarmed, he himself had been shot in a holdup attempt; and that all the employees were required to be armed while in the store for their own protection and for the protection of the store.

Petitioner also offered to prove that under Kansas law, *K.S.A. Sections 21-4201(1)(d)* and *21-4204(b)* he could lawfully possess the revolver. These offers of proof were all refused, as was Petitioner's offer of proof regarding the expungement of his felony conviction.

It should also be remembered that the Petitioner was not using the gun for an unlawful purpose, did not threaten the agents with it, and possessed it only within his place of employment.

Petitioner respectfully suggests that there is involved herein an important and significant question which should be passed on by this Court.

2. There Is a Conflict in the Decisions of the Various Courts of Appeals Upon the Same Issue.

As pointed out above, there is a conflict in decisions in the Courts of Appeals on the issue of specific intent. Some of those decisions holding that specific intent is never an element are *United States* v. *Crow* (9th Cir. 1971), 439 F.2d 1193, vacated on other grounds (1972), 404 U.S. 1009; *United States* v. *Thomas* (6th Cir. 1973), 484 F.2d 909, cert. denied (1973), 415 U.S. 924; *United States* v. *Mostad* (8th Cir. 1973), 485 F.2d 199, cert. denied (1974), 415 U.S. 947; and *United States* v. *Horton* (7th Cir. 1974), 503 F.2d 810. These decisions conflict with *United States* v. *DeBartolo* (1st Cir. 1973), 482 F.2d 312.

In regard to the expungement issue there is likewise a conflict in the Circuits. The Government relied on *United States* v. *Dameron* (5th Cir. 1972), 460 F.2d 294, cert. denied (1972), 409 U.S. 882; *United States* v. *Mostad*, supra; and *United States* v. *Kelly* (8th Cir. 1975), 519 F.2d 794.

In *United States* v. *Hoctor* (9th Cir. 1973), 487 F.2d 270, the Court of Appeals found that the Washington expungement statute undertook to restore a deserving offender to his postconviction status as a full-fledged citizen, and despite decisions in other circuits to the contrary, such statute eliminated the defendant's liability under the federal destructive devices statutes. In *United States* v. *Andrino* (9th Cir. 1974), 497 F.2d 1103, the Court of Appeals held that under the California expungement statute a defendant was still forbidden under California law from possessing a firearm and therefore the federal statute could apply. In our present case the Petitioner could lawfully possess the

revolver under Kansas law, even without the expungement, *K.S.A. 21-4204(b)*.

CONCLUSION

Petitioner respectfully submits that this cause involves serious questions of importance and significance and which will be recurring. They involve serious and meaningful questions of due process of law under the *Fifth Amendment* and should be settled by this Court. The decision below was in error and justice requires that this Court intervene.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1403

UNITED STATES OF AMERICA,
Appellee,
v.
ROY RATLEY,
Appellant.

Appeal From the United States District Court
for the District of Kansas
(D.C. # 75-4-CR2)

(Filed April 1, 1976)

William E. Shull, Kansas city, Missouri (Robert G. Duncan and Duncan & Russell, Kansas City, Missouri, with him on the Brief), for Appellant.

Philip J. Adams, Jr., Special Attorney, United States Department of Justice (E. Edward Johnson, United States Attorney, with him on the Brief), for Appellee.

Before SETH, BARRETT and DOYLE, Circuit Judges.

SETH, Circuit Judge.

Appellant was convicted of receiving a firearm in commerce after having been convicted of a felony in violation of 18 U.S.C.App. § 1202(a)(1), and has taken this appeal.

As to the facts, the record shows that agents of the Alcohol, Tobacco and Firearms Bureau went to appellant's place of employment, a pawn shop or loan company, in search of a suspect thought involved in an unrelated crime. At the shop, the agents encountered appellant who they testified acted "nervous" and had a noticeable "bulge" in his jacket. The agents told appellant that they wished to search him for their own protection. Appellant refused, but reached into his shirt and withdrew a revolver which he handed to his wife. The agents then took the revolver from appellant's wife. Appellant had been convicted of a felony in Kansas and after the seizure of the revolver described above, he petitioned the Kansas state district court where he had been convicted to expunge the record of conviction pursuant to the Kansas expungement statute, K.S.A. 21-4617. The state court granted appellant's request on September 30, 1974.

On January 10, 1975, a one-count indictment was returned charging appellant with the violation of 18 U.S.C.App. § 1202(a)(1) here concerned. Special Attorneys Philip J. Adams and Michael DeFeo, acting pursuant to letters issued under the special commission provisions of 28 U.S.C. § 515, appeared and presented the evidence before the grand jury and actively prosecuted appellant's case.

Appellant raises several grounds for reversal of his conviction. He argues initially that the appointment of Attorneys Adams and DeFeo was improper under the

dictates of 28 U.S.C. § 515(a), and therefore in violation of Rule 6(d), Fed.R.Crim.P. He specifically contends that the letters commissioning the attorneys were improper because they did not "specifically direct" the attorneys' activities and were not issued by the United States Attorney General himself.

The requirements for proper appointment of special attorneys under 28 U.S.C. § 515(a) have been examined by this court in United States v. Katz, ... F.2d ..... (Tenth Circuit, No. 75-1318). That case is applicable to the authorizations here concerned, and we thus find this contention to be without merit.

Appellant next contends that expungement of his previous state conviction by the Kansas state court in effect eliminated his liability under the federal statute in question. The trial court held that the expungement of appellant's record occurred after the date of the offense and that any such expungement does not have a retroactive effect. We affirm for the same reason, and no further examination of the related issues is necessary. The Government need only prove that defendant had been convicted of a felony at the time he received the firearm. United States v. Smith, 520 F.2d 544 (8th Cir.); United States v. Mancino, 474 F.2d 1240 (8th Cir.).

Appellant also relies on the state court's expungement of his conviction to challenge an evidentiary ruling of the trial court. At trial, the Government introduced over appellant's objection a certified copy of his prior conviction. Appellant contends that this was error. He says that the court record was offered by the prosecution pursuant to 28 U.S.C. § 1738 which provides that the records of judicial proceedings in state courts

"shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." He proposes that expungement of his conviction makes the state court record a "nullity" under law and usage in the Kansas courts. He then argues that if the record is a "nullity" in the Kansas courts, it is also a "nullity" in the federal courts under the provisions of 28 U.S.C. § 1738 and its admission in the present case was error.

It appears that the state court record of appellant's conviction, even though expunged, is not a nullity under state law. The conviction "may be considered as a prior conviction in determining the sentence to be imposed . . ." K.S.A. 21-4617. Hence, appellant's contention that the expunged record is no longer a record is without merit.

We find no error in the admission of the record of appellant's conviction.

Appellant next contends that the prosecution failed to prove that the confiscated weapon was a firearm within the meaning of the statute. This is totally without merit. An agent testified it was a revolver and the stipulation was that it was a revolver and loaded. The term "firearm" includes any "handgun." 18 U.S.C. App. § 1202(c)(3). A "handgun," as defined in 18 U.S.C.App. § 1202(c)(5), means:

> ". . . [A]ny pistol or revolver *originally designed to be fired* by the use of a single hand and which is *designed to fire or capable of firing* fixed cartridge ammunition, or any other firearm *designed to be fired* by the use of a single hand." (Emphasis added).

The Smith and Wesson revolver confiscated from appellant is clearly designed to fire or capable of firing and is a firearm within the statutory definition. The Government need not prove that the firearm was operable at the time of the offense and case law has so held. United States v. Pleasant, 469 F.2d 1121 (8th Cir.). In summary, the evidence is sufficient to prove that the confiscated weapon was a firearm within the meaning of the statute.

Finally, appellant objects to the trial court's instruction that the Government "is not required to prove specific intent on the part of the defendant to violate the law. . ." He contends that 18 U.S.C.App. § 1202 (a)(1) requires proof of specific intent as an essential element of the charge. Appellant is in error. The cases unanimously recognize that specific intent or knowledge is not an element of the crime of possessing firearms after having been convicted of a felony. United States v. Thompson, 518 F.2d 534 (8th Cir.); United States v. Powell, 513 F.2d 1249 (8th Cir.). We find no error in the court's instructions.

AFFIRMED.

APPENDIX B

MARCH TERM—May 13, 1976

Before The Honorable David T. Lewis, Chief Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

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No. 75-1403

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROY RATLEY,
Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth, Barrett and Doyle to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

Supreme Court, U. S.
FILED
SEP 16 1976
MICHAEL RODAK, JR., CLERK

No. 75-1806

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROY RATLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1806

ROY RATLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the subsequent expungement of a previous state conviction exempted him from criminal liability under 18 U.S.C. App. 1202(a)(1), prohibiting felons from receiving firearms; (2) that the evidence did not show that the firearm he received was operable; and (3) that the jury should have been required to find specific intent.

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of receiving a firearm in or affecting commerce after having been convicted of a felony, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to imprisonment for a year and a day. The court of appeals affirmed (Pet. App. A).

1. The evidence, which is not in dispute, is summarized by the court of appeals (Pet. App. A2). Briefly, it showed

that on August 19, 1974, federal agents went to a pawnshop at which petitioner was employed to search for a suspect in an unrelated crime. During their investigation, they seized a firearm that petitioner had handed to his wife. The firearm had previously been shipped in interstate commerce.

Petitioner had been previously convicted of a state felony. Following the seizure of the firearm, however, he obtained an expungement of the conviction pursuant to Kansas law (Kans. Stat. Ann. §21-4617 (1974); see Pet. 3-4).

1. Petitioner contends that expungement of his felony conviction after the date of the offense (but prior to indictment) exempts him from the provisions of 18 U.S.C. App. 1202(a)(1). This contention is without merit.

The sanctions of 18 U.S.C. App. 1202(a) apply, *inter alia*, to "[a]ny person who (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * ." An exemption is granted to felons "pardoned by the President of the United States or the chief executive of a State," provided that the felon is also expressly authorized to possess a firearm (18 U.S.C. App. 1203(2)). "By specifically providing that it would recognize only certain pardons, Congress indicated that it did not wish to recognize other means which the states might employ to expunge felony convictions or to restore civil rights." *United States* v. *Kelly*, 519 F. 2d 794, 796 (C.A. 8). Accord, *United States* v. *Potts*, 528 F. 2d 883 (C.A. 9) (*en banc*).[1]

[1]In *Potts*, the Ninth Circuit expressly overruled *United States* v. *Hoctor*, 487 F. 2d 270 (C.A. 9), on which petitioner solely relies to show a conflict in the circuits on this issue.

Furthermore, the expungement of petitioner's felony conviction occurred after the offense for which he was indicted. That expungement, therefore, did not remove petitioner from the coverage of Section 1202(a)(1). "The statutory provision was triggered by his status as a convicted felon, a status which did not change until the [expungement] was received." *United States* v. *Dameron*, 460 F. 2d 294, 295 (C.A. 5), certiorari denied, 409 U.S. 882.[2] For purposes of the statute, petitioner was a convicted felon on the date of the offense.

2. Contrary to petitioner's assertion (Pet. 13-14), the government was not required to prove that the firearm he received was then operable. See, *e.g.*, *United States* v. *Pleasant*, 469 F. 2d 1121, 1125 (C.A. 8). The statute, 18 U.S.C. App. 1202(c)(5), defines firearms to include:

> * * * any pistol or revolver *originally designed to be fired* by the use of a single hand and which is *designed to fire or capable of firing* fixed cartridge ammunition, or any other firearm *originally designed to be fired* by the use of a single hand. [Emphasis added.]

It was stipulated that the weapon seized from petitioner was a loaded revolver. As the court of appeals correctly noted, that revolver was "clearly designed to fire or capable of firing and is a firearm within the statutory definition" (Pet. App. A5).

3. Petitioner asserts (Pet. 14-15) that the trial court erroneously declined to give an instruction requiring proof of specific intent. The court of appeals correctly concluded, however, "that specific intent or knowledge

[2]*Dameron* involved a pardon granted after the offense was committed but prior to indictment.

is not an element of the crime of possessing firearms after having been convicted of a felony. *United States* v. *Thompson,* 518 F. 2d 534 (8th Cir.); *United States* v. *Powell,* 513 F. 2d 1249 (8th Cir.)" (Pet. App. A5). See also *United States* v. *Crow,* 439 F. 2d 1193 (C.A. 9), vacated and remanded on other grounds, 404 U.S. 1009; *United States* v. *Horton,* 503 F. 2d 810 (C.A. 7); *United States* v. *Thomas,* 484 F. 2d 909 (C.A. 6), certiorari denied, 415 U.S. 924.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[3]There is no conflict among the circuits on this question. In *United States* v. *DeBartolo,* 482 F. 2d 312 (C.A. 1), upon which petitioner solely relies (Pet. 16), the court affirmed the use of an instruction that "the Government need prove that the defendant had knowledge only 'that the object involved in such transfer was a gun * * * '" and not that the defendant knew the gun was within the definition of 26 U.S.C. 5845. *Id.* at 313-314. This requirement is perfectly consistent with the position taken in the cases cited above and in the instant case. Compare *United States* v. *Freed,* 401 U.S. 601, 607-610.